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In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ALIAKBAR FAZELIHOKMABAD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE IMMIGRATION AND NATURALIZATION SERVICE

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TABLE OF AUTHORITIES

Page

Cases:

Achacoso-Sanchez v. *INS*, 779 F.2d 1260 (7th Cir. 1985) . 3, 4
Balani v. *INS*, 669 F.2d 1157 (6th Cir. 1982) 4
Hernandez-Cordero v. *INS*, 783 F.2d 1266, reh'g en banc granted, 793 F.2d 701 (5th Cir. 1986) 3
INS v. *Bagamasbad*, 429 U.S. 24 (1976) 7
INS v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987) 4, 5
INS v. *Jong Ha Wang*, 450 U.S. 139 (1981) 1, 2, 7
INS v. *Rios-Pineda*, 471 U.S. 444 (1985) 1, 2, 7
Osuchukwu v. *INS*, 744 F.2d 1136 (5th Cir. 1984) 3, 4
Saldana v. *INS*:
762 F.2d 824 (1985), amended, 785 F.2d 650 (9th Cir. 1986) 2
793 F.2d 222 (9th Cir. 1986) 2
Williams v. *INS*, 773 F.2d 8 (1st Cir. 1985) 4
Yahkpua v. *INS*, 770 F.2d 1317 (5th Cir. 1985) 4

Statutes:

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 *et seq.* 4
Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 *et seq.* 4
§ 5, 100 Stat. 3543 5
§ 5(c), 100 Stat. 3543 5

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The court of appeals held that the Board of Immigration Appeals (BIA) improperly denied respondent's motion to reopen deportation proceedings. As we explained in our petition (at 12-15), the Ninth Circuit has repeatedly engaged in what amounts to *de novo* review of the BIA's discretionary rulings on motions to reopen. It has done so, we noted (Pet. 11-12, 15-16), contrary to the teachings of this Court (*e.g.*, *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985); *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981)), and contrary to the more deferential approach of several other circuits that have addressed the question. The issue is important, we explained (Pet. 23-24), because the immigration authorities are forced to spend valuable time and resources conducting evidentiary hearings and other proceedings in numerous insubstantial cases.

1. Respondent's principal argument in opposing review (Br. in Opp. 6-13) is that the Ninth Circuit's decisions in this area are fully consistent with this Court's opinions and with those in every other circuit. That argument is without merit.

a. This Court has repeatedly made clear that the BIA has wide latitude in ruling on motions to reopen deportation proceedings. See, *e.g.*, *Rios-Pineda*, 471 U.S. at 449; *Jong Ha Wang*, 450 U.S. at 143-144 n.5. The Court has explicitly recognized (*Rios-Pineda*, 471 U.S. at 446; *Jong Ha Wang*, 450 U.S. at 140-141) that a motion to reopen is not provided for by statute but is purely a product of regulation to enable the BIA to reevaluate its prior disposition in light of significant new developments. And the Court (*id.* at 144 n.5) has emphasized the importance of permitting the BIA to be selective in deciding when to reopen a case.

As we explained (Pet. 8, 12-15), the Ninth Circuit, in this case and several others, has adopted standards of review that cannot be reconciled with this Court's decisions. Specifically, the Ninth Circuit essentially requires the BIA to discuss exhaustively each point raised by the alien in the motion to reopen. Failure to address a factor (or discussion of it in a summary manner) is a ground for reversal. Moreover, the Ninth Circuit frequently second-guesses the explanation actually given by the BIA, even when the BIA's reasons are entirely plausible and reasonable. As a result, it has reversed the BIA on a number of occasions for insignificant reasons. See Pet. 13-14 (discussing cases).

Although respondent asserts that the Ninth Circuit has been faithful to the decisions of this Court (Br. in Opp. 12-13), several judges *on that circuit* strongly believe otherwise. As we noted (Pet. 14-15), in a recent dissent from the denial of rehearing en banc in *Saldana* v. *INS*, 762 F.2d 824 (1985), amended, 785 F.2d 650 (9th Cir. 1986), Judge Sneed, writing for himself and six other judges (793 F.2d 222 (9th Cir. 1986)), discussed at length (*id.* at 224-225) how various panels have disregarded this

Court's teachings that Congress bestowed discretion on the Attorney General and his delegates, not on the judicial branch.

The present case exemplifies the Ninth Circuit's application of a virtually insuperable standard of review. Although respondent's case was in no way unusual or compelling, and although the BIA gave detailed reasons for denying reopening, the court has remanded the case for further proceedings. This result is plainly contrary to *Jong Ha Wang* and *Rios-Pineda.*

b. Respondent also errs in arguing (Br. in Opp. 6-12) that the Ninth Circuit's decisions do not conflict with decisions of other circuits. As we explained (Pet. 15-16), the law in the First, Second, Sixth, and Seventh Circuits is that the BIA, in making a discretionary determination, must be affirmed unless its decision was not rational, departed from prior policies without explanation, or rested on an impermissible basis, such as class-based discrimination. See, *e.g., Achacoso-Sanchez* v. *INS*, 779 F.2d 1260, 1265 (7th Cir. 1985) (citing authority). Under that standard, the BIA's reasons "need not be compelling, or even convincing, to be sufficient" (*id.* at 1266). In the Fifth Circuit, the BIA is under "no duty to write an exegesis on every contention." Rather, the BIA is required simply to "consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Osuchukwu* v. *INS*, 744 F.2d 1136, 1142-1143 (5th Cir. 1984); but see *Hernandez-Cordero* v. *INS*, 783 F.2d 1266, 1269, reh'g en banc granted, 793 F.2d 701 (5th Cir. 1986). The formulation of these deferential review standards is not an artifice for engaging in the kind of strict scrutiny conducted by the Ninth Circuit. Rather, as the case law reveals, the standard of review in those other circuits, both as articulated and as applied, differs substantially from the standard applied in

the Ninth Circuit.[1] Those other circuits properly recognize that in a system of immigration quotas, "[l]iberal use of discretionary relief may reward those who violate the immigration laws at the expense of those who observe them" (*Achacoso-Sanchez*, 779 F.2d at 1263).

2. Petitioner also argues (Br. in Opp. 13-17) that the Court should deny review because of the recent enactment of two immigration statutes: the Immigration Reform and Control Act of 1986 (Reform Act), Pub. L. No. 99-603, 100 Stat. 3359 *et seq.*, and the Immigration Marriage Fraud Amendments of 1986 (Marriage Fraud Act), Pub. L. No. 99-639, 100 Stat. 3537 *et seq.* This claim likewise lacks merit.

With respect to the Reform Act, petitioner does not dispute our position (Pet. 17-19) that the legal issues remain important to the Immigration and Naturalization Service (INS), notwithstanding the new legislation. Cf. *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 5 n.3 (question of proper standard governing asylum

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[1] See, *e.g.*, *Achacoso-Sanchez* (upholding BIA's denial of motion to reopen to apply for adjustment of status where alien married one day before her deportation hearing and engaged in dilatory legal maneuvers); *Williams* v. *INS*, 773 F.2d 8 (1st Cir. 1985) (upholding BIA's denial of alien's motion to reopen to apply for adjustment of status because of the alien's abuses of the immigration laws, even though the alien claimed that her actions were the result of ignorance rather than deliberate disregard of the law); *Yahkpua* v. *INS*, 770 F.2d 1317, 1321 (5th Cir. 1985) (upholding BIA's denial of request to reopen despite BIA's failure to mention all of the alien's contentions); *Osuchukwu*, 744 F.2d at 1142 (upholding BIA's decision despite the court's view that if it were the factfinder, it would have reached a different result); *Balani* v. *INS*, 669 F.2d 1157 (6th Cir. 1982) (affirming BIA's denial of motion to reopen to apply for suspension of deportation even though the alien's wife, his U.S. citizen son, and all of his other close relatives lived here, and even though he had a profitable business here that provided the sole support for his family).

remains important notwithstanding the enactment of the Reform Act). Rather, his argument is that "it is a foregone conclusion that by the time this Court considers this case, if accepted for consideration, respondent will have already filed his application for temporary residence, obtained work authorization and escaped deportation" (Br. in Opp. 14). But as we explained (Pet. 17-19), obtaining lawful temporary status is only the first step of the process. Only after an 18-month waiting period may such an alien then obtain lawful permanent resident status. Moreover, as we pointed out (*id.* at 18-19 & n.18), it may be advantageous for respondent to pursue his motion to reopen, since legalization does not afford an alien all of the benefits available to someone who obtains permanent residence status in some other way. See *Cardoza-Fonseca*, slip op. 4-5 n.3. Significantly, respondent has not at this time attempted to withdraw his motion to reopen despite his alleged confidence that he will eventually obtain temporary (and later permanent) resident status under the Reform Act. In short, the enactment of the Reform Act provides no basis for this Court to deny review.

Respondent also claims (Br. in Opp. 15-17) that the case is unimportant in light of the Marriage Fraud Act. But that statute merely provides, in relevant part, that an alien cannot obtain adjustment of status based on an eleventh-hour marriage (§ 5, 100 Stat. 3543).[2] It will in no way affect the number of motions to reopen to apply for other forms of relief, such as suspension of deportation, asylum, or withholding of deportation.[3] Respondent

[2] That provision applies only to marriages entered into after the statute's effective date (November 10, 1986) (§ 5(c), 100 Stat. 3543), and therefore does not affect respondent's request for adjustment of status. And it obviously has no effect on his request for suspension of deportation.

[3] Indeed, respondent concedes (Br. in Opp. 15-16 n.11) that even certain motions to reopen to apply for adjustment of status based on marriage will be permissible notwithstanding the Marriage Fraud Act.

therefore errs in claiming (Br. in Opp. 17) that a decision by the Court in this case "would have little practical applicability to other subsequent cases." In short, the new statute governing marriage fraud does not undermine the importance of the issues in this case.[4]

3. Even though the procedural posture of this case is similar to that in *Rios-Pineda* and *Jong Ha Wang*, respondent argues (Br. in Opp. 17-18) that this case is not ripe for review because there has not yet been a remand to the BIA. That argument misperceives the whole basis of the INS's concern. The Ninth Circuit's decisions have required the immigration authorities to expend valuable time and resources conducting further proceedings on remand in cases like this one, in which the alien is plainly not deserving of discretionary relief. Moreover, contrary to respondent's assertion (Br. in Opp. 18), this is not a case involving factual disputes.[5] Rather, the BIA has carefully

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[4] As we noted, however (Pet. 22 n.19), the Marriage Fraud Act *is* significant in this case in that it confirms the correctness of the BIA's decision to give less weight to respondent's eleventh-hour marriage.

[5] Respondent (Br. in Opp. 3 n.3) states that the government has "distorted the facts" of the case "throughout these proceedings." He cites, as the sole example, the government's spelling of his wife's name as "Thomas" rather than "Thoms." We regret any error in this regard, but we note that the spelling "Thomas" appears in some of respondent's own papers. See R. 17 (supplemental memorandum in support of the motion to reopen, filed by respondent's present counsel); R. 42 (affidavit of "Lauralee Thomas Fazelihokmabad" in support of the motion to reopen) ("R." refers to the certified administrative record, a copy of which was lodged with the court of appeals).

The only other factual matter analyzed by respondent in his opposing brief is his claim that his prior attorney was solely responsible for his failure to prosecute his original appeal in the court of appeals (Br. in Opp. 2 n.1). But as we pointed out (Pet. 21), and as respondent does not dispute, no effort was made by respondent to keep in contact with his attorney so that he could keep abreast of developments in his case. Thus, even when the facts are viewed most favorably to respondent, he must bear the blame for not pursuing his appeal.

reviewed respondent's motion to reopen and supporting materials and has concluded that relief is inappropriate both on discretionary grounds and because no *prima facie* showing of hardship was made (Pet. App. 9a-15a).[6] A remand for further proceedings would serve no useful purpose.

4. Finally, it is significant that while respondent tries to defend the standard of review applied by the Ninth Circuit, he does not even attempt to respond to our explanation (Pet. 20-23) of why that court erred on the merits.[7] As we indicated, the BIA's decision was correctly reasoned and fully accurate. In *Jong Ha Wang*, the Court stated (450 U.S. at 145): "[N]othing in the allegations indicated that this is a particularly unusual case requiring the Board to reopen the deportation proceedings." That statement is even more true in the present case.

To summarize, the issues presented are important to the proper functioning of the INS and to the orderly process of administering a large volume of immigration claims. Review is necessary to correct the Ninth Circuit's erroneous course of decision and to reaffirm the BIA's right to be selective in granting motions to reopen deportation proceedings.

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[6] Since the BIA denied relief on discretionary grounds, it was not even required to address the question whether respondent established a *prima facie* case for relief. See *Rios-Pineda*, 471 U.S. at 449; *INS* v. *Bagamasbad*, 429 U.S. 24 (1976).

[7] For example, he does not answer our legal argument (Pet. 23), in response to the Ninth Circuit's concern that there is no American consulate in Iran, that he could apply for permission to "self deport" to a country other than Iran or that he could apply in Iran for a visa to a third country and obtain a visa to enter the United States upon arrival in that country. Nor does he try to defend the court's holding that his violations of the immigration laws should be excused because, while ignoring the advice of an attorney, he relied on the advice of his (nonlawyer) friends.

For the foregoing reasons and those given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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